



Billing Code 6325-63

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 890

RIN: 3206-AN14

Federal Employees Health Benefits Program; Subrogation and Reimbursement Recovery

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The United States Office of Personnel Management (OPM) is issuing a final rule to amend the Federal Employees Health Benefits (FEHB) Program regulations to reaffirm the conditional nature of FEHB Program benefits and benefit payments under the plan's coverage as subject to a carrier's entitlement to subrogation and reimbursement recovery, and therefore, that such entitlement falls within the preemptive scope of the FEHA Act. FEHB contracts and brochures must include, and in practice already include, a provision incorporating the carrier's subrogation and reimbursement rights, and FEHB plan brochures must contain an explanation of the carrier's subrogation and reimbursement policy.

DATES: This final rule is effective [INSERT 30 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Marguerite Martel, Senior Policy Analyst at (202) 606-0004.

SUPPLEMENTARY INFORMATION: The FEHB Act, as codified at 5 U.S.C. 8902(m)(1), provides: "The terms of any contract under this chapter which relate to the nature, provision, or

extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans.” This final regulation reaffirms that a covered individual’s entitlement to FEHB benefits and benefit payments is conditioned upon, and limited by, a carrier’s entitlement to subrogation and reimbursement recoveries pursuant to a subrogation or reimbursement clause in the FEHB contract. This final regulation also reaffirms that a FEHB carrier’s rights and responsibilities pertaining to subrogation and reimbursement relate to the nature, provision and extent of coverage or benefits and benefit payments provided under title 5, United States Code Chapter 89, and therefore are effective notwithstanding any state or local law or regulation relating to health insurance or plans. Some state courts have interpreted ambiguity in Section 8902(m)(1) to reach a contrary result and thereby to allow state laws to prevent or limit subrogation or reimbursement rights under FEHB contracts. In this final rule, OPM is exercising its rulemaking authority under 5 U.S.C. 8913 to ensure that carriers enjoy the full subrogation and reimbursement rights provided for under their contracts.

The interpretation of Section 8902(m)(1) promulgated herein comports with longstanding Federal policy and furthers Congress’s goals of reducing health care costs and enabling uniform, nationwide application of FEHB contracts. The FEHB program insures approximately 8.2 million federal employees, annuitants, and their families, a significant proportion of whom are covered through nationwide fee-for-service plans with uniform rates. The government pays on average approximately 70% of Federal employees’ plan premiums. 5 U.S.C. 8906(b), (f). The government’s share of FEHB premiums in 2014 was approximately \$33 billion, a figure that tends to increase each year. OPM estimates that FEHB carriers were reimbursed by

approximately \$126 million in subrogation recoveries in that year. Subrogation recoveries translate to premium cost savings for the federal government and FEHB enrollees.

OPM proposed this amendment in a notice of proposed rulemaking on January 7, 2015 (80 FR 931). The proposed rule had a 30 day comment period during which OPM received 3 comments.

Responses to comments on the proposed rule:

OPM received comments from an association of FEHB carriers, a trade association serving subrogation and recovery professionals, and a provider of subrogation and recovery services. The comments all expressed support for the regulation and suggested some changes to clarify the language in the proposed rule.

All commenters suggested edits to the proposed definitions of “subrogation” and “reimbursement” at 5 CFR 890.101 to more completely reflect the universe of FEHB Program plan recoveries. All three commenters expressed concern with the reference to “a responsible third party” in the definitions, indicating that the use of this phrase has been interpreted to foreclose “first party” claims for subrogation and recoveries, such as uninsured and underinsured motorist coverage, and recommended adding other insurance including workers’ compensation insurance, to the definition to be consistent with entitlements listed in the proposed § 890.106(c)(2) and (f). OPM agrees that the definitions of subrogation and reimbursement should include first party claims. In addition, commenters noted that § 890.106(b) and (f) should be updated to reflect this change. The definitions at § 890.101 and other corresponding sections have been updated accordingly as necessary.

The commenters also suggested additional specific changes to the proposed definition of “reimbursement.” Two of the commenters noted that the definition of reimbursement should address the situation of both illness and injury. OPM has revised the definition of reimbursement to accept this change. One commenter suggested that the final rule clarify that the right of reimbursement is cumulative with and not exclusive of the right of subrogation. OPM has incorporated this clarification. Two commenters suggested that the definition should reflect that a covered individual need not have actually received a recovery payment so long as the covered individual is entitled to receive a payment. OPM does not agree that the right of reimbursement is sufficiently broad to require an individual to reimburse the carrier in a circumstance where the individual has not actually received a recovery, and rejects this change. One commenter indicated that the right of reimbursement is specific to a recovery from an individual who has received a third party payment while the right of subrogation permits a carrier to recover directly from other sources. OPM agrees with this comment and has clarified the definition of “subrogation” accordingly.

One commenter suggested that § 890.106(b) be amended to align the regulation and FEHB carrier contract requirements. OPM has revised this section to refer to contractual requirements.

One commenter noted that § 890.106(f) should be clarified to ensure that the carrier has a subrogation right to recover directly from a responsible insurer all amounts available to or on behalf of the covered individual. We have clarified the provision accordingly.

Two commenters noted that proposed § 890.106(b) and (h) did not clearly reflect OPM’s intention for this regulation to apply to existing contracts. We agree and are slightly revising the

language of paragraphs (b) and (h) to be clearer. Paragraph (h) formalizes OPM's longstanding interpretation of what Section 8902(m)(1) has meant since Congress enacted it in 1978. This interpretation applies to all FEHBA contracts. Paragraph (b)(1) in the final rule likewise formalizes OPM's longstanding interpretation of subrogation and reimbursement clauses in carrier contracts as constituting a condition of and a limitation on the nature of benefits or benefits payments and on the provision of benefit payments. See Carrier Letter 2012-18. FEHBA contracts that contain subrogation and reimbursement clauses condition benefits and benefit payments on giving the carrier a right to pursue subrogation and reimbursement and therefore are directly related to benefits, benefit payments, and coverage within the meaning of Section 8902(m)(1). The interpretations in paragraphs (b)(1) and (h) together clarify and ensure that carriers enjoy full subrogation and reimbursement rights notwithstanding any state law to the contrary, and they apply in any pending or future case.

To clarify further the relationship among subrogation, reimbursement, benefits, and coverage, we are also in paragraph (b)(2) requiring carrier contracts that contain subrogation and reimbursement clauses to contain language specifying that benefits and benefit payments are extended to a covered individual on the condition that the carrier may pursue and receive subrogation and reimbursement. This substantive requirement, unlike the interpretation discussed above, will govern any benefit payment made under any carrier contract entered into after this regulation goes into effect.

OPM is issuing this final rule with changes to §§ 890.101(a) and 890.106(b) and (f) as described above.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because the regulation only affects health insurance benefits of Federal employees and annuitants. Executive Order 12866.

Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with Executive Orders 13563 and 12866.

Federalism

We have examined this rule in accordance with Executive Order 13132, Federalism, and have determined that this rule restates existing rights, roles and responsibilities of State, local, or tribal governments.

List of Subjects in 5 CFR Parts 890

Administrative practice and procedure, Government employees, Health facilities, Health insurance, Health professions, Hostages, Iraq, Kuwait, Lebanon, Military personnel, Reporting and recordkeeping requirements, Retirement

U.S. Office of Personnel Management.

Katherine Archuleta,
Director.

PART 890—FEDERAL EMPLOYEES HEALTH BENEFITS PROGRAM

1. The authority citation for part 890 continues to read as follows:

Authority: 5 U.S.C. 8913. Sec. 890.301 also issued under sec. 311 of Pub. L. 111–03, 123 Stat. 64; Sec. 890.111 also issued under section 1622(b) of Pub. L. 104–106, 110 Stat. 521; Sec. 890.112 also issued under section 1 of Pub. L. 110–279, 122 Stat. 2604; 5 U.S.C. 8913; Sec. 890.803 also issued under 50 U.S.C. 403p, 22 U.S.C. 4069c and 4069c–1; subpart L also issued under sec. 599C of Pub. L. 101–513, 104 Stat. 2064, as amended; Sec. 890.102 also issued under sections 11202(f), 11232(e), 11246 (b) and (c) of Pub. L. 105–33, 111 Stat. 251; and section 721 of Pub. L. 105–261, 112 Stat. 2061.

2. In § 890.101, in paragraph (a), add definitions in alphabetical order for “reimbursement” and “subrogation” to read as follows:

§890.101 Definitions; time computations.

(a) * * *

Reimbursement means a carrier’s pursuit of a recovery if a covered individual has suffered an illness or injury and has received, in connection with that illness or injury, a payment from any party that may be liable, any applicable insurance policy, or a workers’ compensation program or insurance policy, and the terms of the carrier’s health benefits plan require the covered individual, as a result of such payment, to reimburse the carrier out of the payment to the extent of the benefits initially paid or provided. The right of reimbursement is cumulative with and not exclusive of the right of subrogation.

* * * * *

Subrogation means a carrier’s pursuit of a recovery from any party that may be liable, any applicable insurance policy, or a workers’ compensation program or insurance policy, as

successor to the rights of a covered individual who suffered an illness or injury and has obtained benefits from that carrier's health benefits plan.

* * * * *

3. Section 890.106 is revised to read as follows:

§890.106 Carrier entitlement to pursue subrogation and reimbursement recoveries.

(a) All health benefit plan contracts shall provide that the Federal Employees Health Benefits (FEHB) carrier is entitled to pursue subrogation and reimbursement recoveries, and shall have a policy to pursue such recoveries in accordance with the terms of this section.

(b)(1) Any FEHB carriers' right to pursue and receive subrogation and reimbursement recoveries constitutes a condition of and a limitation on the nature of benefits or benefit payments and on the provision of benefits under the plan's coverage.

(2) Any health benefits plan contract that contains a subrogation or reimbursement clause shall provide that benefits and benefit payments are extended to a covered individual on the condition that the FEHB carrier may pursue and receive subrogation and reimbursement recoveries pursuant to the contract.

(c) Contracts shall provide that the FEHB carriers' rights to pursue and receive subrogation or reimbursement recoveries arise upon the occurrence of the following:

(1) The covered individual has received benefits or benefit payments as a result of an illness or injury; and

(2) The covered individual has accrued a right of action against a third party for causing that illness or injury; or has received a judgment, settlement or other recovery on the basis of that illness or injury; or is entitled to receive compensation or recovery on the basis of the illness or injury, including from insurers of individual (non-group) policies of liability insurance that are issued to and in the name of the enrollee or a covered family member.

(d) A FEHB carrier's exercise of its right to pursue and receive subrogation or reimbursement recoveries does not give rise to a claim within the meaning of 5 CFR 890.101 and is therefore not subject to the disputed claims process set forth at 5 CFR 890.105.

(e) Any subrogation or reimbursement recovery on the part of a FEHB carrier shall be effectuated against the recovery first (before any of the rights of any other parties are effectuated) and is not impacted by how the judgment, settlement, or other recovery is characterized, designated, or apportioned.

(f) Pursuant to a subrogation or reimbursement clause, the FEHB carrier may recover directly from any party that may be liable, or from the covered individual, or from any applicable insurance policy, or a workers' compensation program or insurance policy, all amounts available to or received by or on behalf of the covered individual by judgment, settlement, or other recovery, to the extent of the amount of benefits that have been paid or provided by the carrier.

(g) Any contract must contain a provision incorporating the carrier's subrogation and reimbursement rights as a condition of and a limitation on the nature of benefits or benefit payments and on the provision of benefits under the plan's coverage. The corresponding health benefits plan brochure must contain an explanation of the carrier's subrogation and reimbursement policy.

(h) A carrier's rights and responsibilities pertaining to subrogation and reimbursement under any FEHB contract relate to the nature, provision, and extent of coverage or benefits (including payments with respect to benefits) within the meaning of 5 U.S.C. 8902(m)(1). These rights and responsibilities are therefore effective notwithstanding any state or local law, or any regulation issued thereunder, which relates to health insurance or plans.

[FR Doc. 2015-12378 Filed: 5/20/2015 08:45 am; Publication Date: 5/21/2015]